Water Law Primer

WATER SUPPLY AND GROWTH IN THE CLARK FORK RIVER BASIN March 10-11, 2008

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Water Right Ownership

- Real Property Interest
- Usufructory (use) right do not own the water itself
- State owns the water subject to appropriation for beneficial use
- Constitutional protection cannot affect pre-July 1, 1973 water rights without due process of law

Basic Water Law Principles

- First in time is first in right
 - Water users with an earlier priority date are entitled to divert their full water right before a junior water user, with a later priority date, diverts any water
 - No sharing of shortages
 - Senior can place a call on any junior water right on a tributary source, including groundwater – do not have to make call on the most junior right
 - Whenever water is not being used by a senior, it is available for use by the next senior junior
 - No preference by purpose of use

Basic Water Law Principles

Use it or lose it

- Beneficial use is the measure, limit & extent of a water right
- Waste is prohibited
- Abandonment not using water for ten or more years, when water is available, raises a rebuttable presumption of abandonment
- Does not apply to federal & tribal reserved rights

Water Use Act

- Prior to July 1, 1973
 - Acquire rights by use, filed notices of appropriation, or district court decree
 - Subject to adjudication by the Water Court
 - No pre-approval for changes in use
- After July 1, 1973
 - New water rights require a permit from DNRC
 - Changes in use require authorization from DNRC

Exceptions to DNRC Permit Requirement – 85-2-306

Groundwater less than 35 gpm up to 10 acre feet per year

 Stock pond less than 30 af/yr on nonperennial source serving 40 acres or more

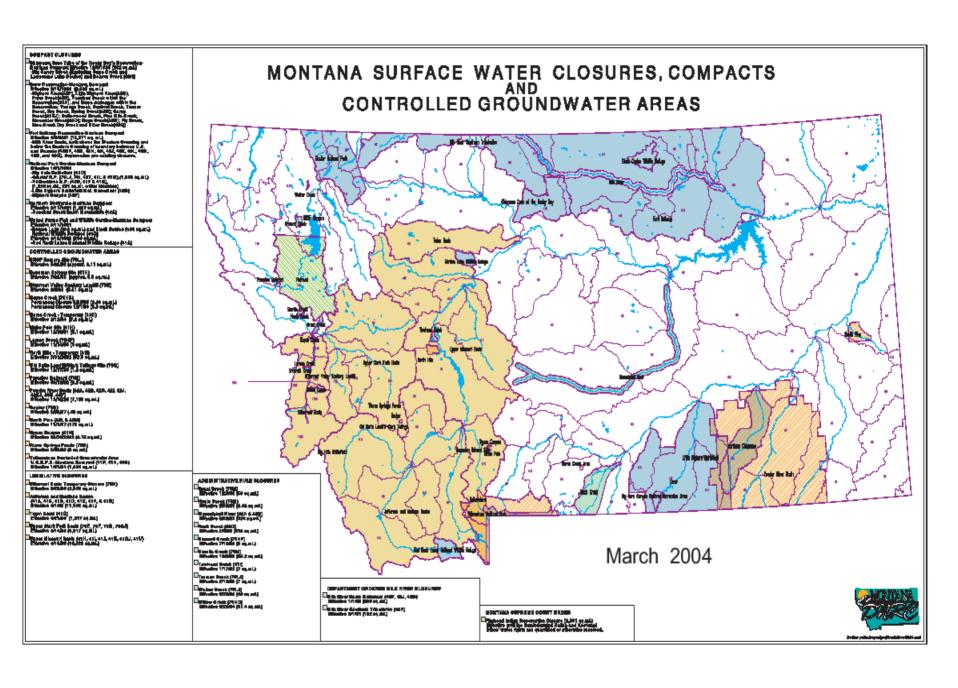
DNRC Permitting Criteria

85-2-311 criteria

- Physically available at point of diversion
- Legally available during period of appropriation
- No adverse affect to senior water rights
- Adequate means of diversion, construction & operation
- Beneficial use
- Possessory interest
- Water quality

Permit applications cannot be filed in some areas

- Basin closures in highly appropriated areas
 - Upper Missouri River
 - Madison/Jefferson River
 - Teton River
 - Upper Clark Fork River
 - Bitterroot River
 - Milk River
 - Musselshell River
- No new permits for most surface water uses
- Ground water permits are allowed only if impacts to surface water are mitigated



DNRC Change Criteria

- 85-2-402 criteria
 - No adverse affect to other water rights, both senior
 & junior
 - Adequate means of diversion, construction & operation
 - Beneficial use
 - Water quality
- Generally, need to show no increase in consumptive use

Burden of Proof for Permits & Changes

- Applicant must prove all of the criteria by a preponderance of evidence regardless of whether an objection is filed
- If permit or change is for more than 5.5 cfs and 4,000 af/yr or is for out-of-state use, burden of proof is clear and convincing evidence & additional criteria apply
- Changes for out-of-state uses require legislative approval